Filed 2/26/16 In re l.R. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re I.R. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. K.R., Defendant and Appellant.	E064005 (Super.Ct.No. SWJ1400070) O P I N I O N

APPEAL from the Superior Court of Riverside County. Donna L. Crandall, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Emily Uhre, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court terminated defendant and appellant, K.R.'s (Father), parental rights as to the minors, I.R. (born September 2012) and J.R. (born September 2013). On appeal,[1] defendant makes four contentions: (1) insufficient evidence supported the juvenile court's jurisdictional finding as it pertains to father; (2) insufficient evidence supported the court's order finding that plaintiff and respondent, Riverside County Department of Public Social Services (the Department), provided Father reasonable services; (3) the court erred in declining to provide Father a hearing on his Welfare and Institutions Code section 388[2] petition; and (4) Father's counsel provided prejudicial ineffective assistance of counsel (IAC). We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On January 18, 2014, personnel from the Department received allegations that the mother (Mother)[3] had been arrested for assault with a deadly weapon against her roommate. Law enforcement additionally charged Mother with child endangerment and possession of methamphetamine. Mother had a prior criminal history, including battery

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[1] Father has also filed a related petition for writ of habeas corpus (case No. E064720). We ordered the writ petition considered with (but not consolidated with) this appeal for the purpose of determining whether an order to show cause should issue. We will rule on the petition by separate order.

[2] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[3] Mother is not a party to this appeal.

on a police officer, drinking alcohol while a passenger in a moving vehicle, and an arrest for possession of controlled substances. Mother had a prior history with the Department, which included allegations of domestic violence between the parents and substance abuse; I.R. had tested positive for amphetamines at birth.

Mother reported that Father did not visit with the minors. She said Father had only seen I.R. five times during I.R.'s life and had never seen J.R. Father reported last having contact with the minors on Christmas in 2013, prior to which he had seen I.R. in July 2013, on Christmas in 2012, and on Thanksgiving in 2012. Father asserted his contact with the minors was limited due to personal financial issues and Mother's intemperance.

Father reported "on going concerns regarding the mother abusing alcohol and methamphetamines while caring for the children. He reported his belief that the mother is a 'tweaker.'" Father reported incidents of domestic violence initiated by Mother against him, one of which occurred while he was holding I.R. Father stated that he historically had unstable housing, previously living in a homeless shelter; however, he reported he was currently residing with his brother which was, nonetheless, inappropriate for the minors and from which he was facing eviction. Father said he was currently looking for a homeless shelter which would accommodate the minors.

In the juvenile dependency petition filed on January 22, 2014, the Department alleged that Father knew or should have known Mother abused methamphetamines and alcohol, had unresolved anger issues, and that Father had failed to intervene in order to

protect the minors (b-5). The Department additionally alleged Father was unable to provide for the minors because he lived a transient lifestyle (b-6 & g-2). On January 23, 2014, the juvenile court detained the minors.

In the jurisdictional and dispositional report filed February 21, 2014, the social worker reported Father visited the minors on February 3, 2014. Father reported he was unable to engage in further visitation due to transportation issues. The social worker assured Father she would provide him with vouchers for public transportation in the future. The social worker issued service referrals to Father for hair follicle testing, parenting education, domestic violence counseling, a residential program for male victims of domestic violence, and paternity testing.

In an addendum report filed March 19, 2014, the social worker wrote that, with respect to referrals for Father: "I provided the father with a referral to a domestic violence shelter for men in the City of Palmdale; the father informed this worker that it was too far for him to enroll in." The social worker reported Father's visitation was inconsistent as the social worker had difficulty contacting Father because he did not answer his phone and did not timely return messages. Father's case plan included a domestic violence program for victims, parenting education, and substance abuse testing. In a first amended juvenile dependency petition filed on March 26, 2014, the Department struck the b-5 allegation.

At the jurisdictional and dispositional hearing on March 26, 2014, Father's counsel stated that Father "is not present today. I spoke with him on the telephone

recently. He did indicate he was going to be in court. . . . [¶] I would offer no comment on the issue of jurisdiction. [¶] The only allegation as to father is transient lifestyle, unable to care for the children." The court authorized "return" of the minors to Father upon his obtainment of a suitable home. The court found the allegations in the petition true and ordered reunification services for the parents.

In the status review report filed September 12, 2014, the social worker recommended termination of reunification services for Mother, but a continuance of reunification services for Father for an additional six months. Father indicated he was participating in either an anger management or domestic violence class; however, the Department had not received any supporting documentation. Father also reported starting a two-hour weekly parenting program in June 2014, but also failed to provide any supporting documentation. During the reporting period, Father visited the minors nine times. Father was deemed "moderately consistent in his visitation. He is reported to be appropriate. He provides snacks, plays with the children, and changes their diapers. He does have some difficulty managing both children during the visits and requires assistance at times."

At a hearing on September 25, 2014, the court noted: "I would encourage, if your client has proof that he's been involved in or completed any programs, that he, first of all, provide it to you and also the social worker and that be provided in an addendum by the Department for the next hearing." Father's attorney indicated: "I had a chance to speak

with father. We have no objection to the matter being set. And . . . we will provide information to the social worker and to the Court by the next hearing."

In an addendum report filed October 20, 2014, the social worker observed that Father "has . . . met with several hurdles while trying to complete his case plan, he is currently homeless and has limited funds and despite these difficulties, [Father] has been attending visits, maintaining contact with the Department, and making effort[s] to participate in services. For this reason, the Department believes that [Father] should be allowed to continue to receive services in order to meet his case plan goals." Father had attended six sessions of a parent education program, but had yet to complete it. Father reported that he intended to enroll in a domestic violence class.

At a hearing on October 23, 2014, Father's attorney stated that he would submit a progress report reflecting Father's enrollment in an anger management program: "Father didn't have documentation with him today. He indicated he submitted it to the social worker. I'm not seeing it attached here." Father's counsel further noted: "We don't know whether or not father was participating in a domestic-violence class. I've only presented evidence of the anger-management program." The court indicated it had looked at a document reflecting that Father had enrolled in an anger management program on October 21, 2014.

The court noted: "There's absolutely no evidence of any effort to be involved in any program until there was attendance in the parenting program starting on June 25th, which was about six months or five months after detention. He's attended six classes and

has additional classes still to be done. He's attended six classes over a period of eight or nine months." The court observed that Father had had only nine visits with the minors over a nine-month period. Father stated: "I missed two visits because they had mumps and then scheduling because I was working and I was doing these programs and so forth. I'm riding on the bus. These buses take a long time to go back and forth. It slows down my momentum." Despite the Department's recommendation to continue Father's reunification services, the court terminated both parents' services.

In the section 366.26 report filed on February 4, 2015, the social worker noted that Father's visitation had "not been very consistent." "The father has at times cancelled or no showed for visits due to transportation issues however when the father does attend visits, the monitor describes him as appropriate."

On February 23, 2015, the court continued the section 366.26 hearing for an additional 120 days upon stipulation of the parties. The Department desired additional time to compile an adoption report and Father wanted the opportunity to have liberalized visitation and make other progress in order to file a section 388 petition. On February 24, 2015, Father filed a section 388 petition requesting reinstatement of reunification services because he had completed a substance abuse program and demonstrated a sustained period of sobriety. Father attached documentation reflecting that he had completed 12 sessions of an anger management program and a 10-week parenting program. The court ordered a hearing on the petition.

In an addendum report filed April 6, 2015, the social worker noted the minors had been placed in a prospective adoptive home on March 13, 2015. The Department requested an additional continuance of 120 days to complete a preliminary adoption assessment. The social worker reported that Father had not enrolled in a substance abuse program.

In an addendum report dated April 17, 2015, the social worker recommended that the court terminate the parents' parental rights. Father reportedly had an appointment to be assessed for entrance into a shelter for families and had applied for on-site housing for he and the minors; however, no room was available at that time, but would reportedly open up soon thereafter.

On April 22, 2015, Father's counsel withdrew the section 388 petition "to allow father to show there's a change of circumstances as to his living situation." The court stated: "I think that there wasn't enough of a change of circumstance to—to justify this being heard, but [the Department's attorney] does point out very correctly [that] housing stability is an issue that should be addressed and must be addressed." The court denied the petition without prejudice to the filing of an additional petition at a later date.

On June 22, 2015, Father filed another section 388 petition requesting reinstatement of reunification services. At the section 366.26 hearing on June 22, 2015, the court denied the petition.[4] The court terminated the parents' parental rights. Father

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[4] The minute order reflects that Father's request to *file* the section 388 petition was "denied for [the] reasons stated on the record." However, Father's second section 388 petition bears a file stamp date of June 22, 2015. The JV-183 form attached to the

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filed an appeal specifying it was from the order terminating his parental rights and from the denial of the motion to reinstate services.

II. DISCUSSION

A. *Jurisdictional Findings*

Father contends there was insufficient evidence to support the court's jurisdictional findings with respect to Father. The Department responds that this court lacks jurisdiction to address the claim because Father failed to appeal from the dispositional order, the first appealable order after the jurisdictional findings. Father replies that he may challenge the jurisdictional findings because the court failed to advise him of his appellate rights, the court's jurisdictional findings were a violation of Father's due process rights because they were based on Father's poverty, and that Father's counsel provided IAC for failing to challenge the order on the latter basis. We agree with the Department.

"One of the most fundamental rules of appellate review is that the time for filing a notice of appeal is jurisdictional. '[O]nce the deadline expires, the appellate court has no power to entertain the appeal.' [Citation.]" (*In re A.O.* (2015) 242 Cal.App.4th 145, 148 [Fourth Dist., Div. Two].) A notice of appeal from an appealable juvenile court order must be filed within 60 days of the rendition of judgment. (Cal. Rules of Court, rule

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petition reflects the court declined to order a *hearing* and denied the section 388 *request* because it did not state new evidence or a change of circumstances and the proposed change did not promote the best interests of the children.

8.406(a)(1).)[5] "A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment . . . ." (§ 395, subd. (a)(1).) """A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order." [Citation.]' [Citations.]" (*In re S.B.* (2009) 46 Cal.4th 529, 532; accord, *In re Z.S.* (2015) 235 Cal.App.4th 754, 769.)

"""If an order is appealable . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata." [Citation.] [¶] "An appeal from the most recent order entered in a dependency matter may not challenge prior orders, for which the statutory time for filing an appeal has passed." [Citations.]' [Citations.]" (*Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147, 1156.) "This '. . . rule' holds 'that an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order,' even when the issues raised involve important constitutional and statutory rights. [Citation]" (*In re Z.S.*, *supra*, 235 Cal.App.4th at pp. 769-770.) "'The first appealable order in a dependency case is the dispositional order. . . . [A] challenge to the jurisdictional findings must be raised in an appeal from the dispositional order.' [Citation.]" (*In re A.O.*, *supra*, 242 Cal.App.4th at p. 148.)

Here, the juvenile court issued its jurisdictional and dispositional orders on March 26, 2014. Father did not attempt to file either a timely or late appeal from the dispositional order. Indeed, the notice of appeal filed by Father in the current case on

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[5] All further references to rules are to the California Rules of Court.

July 10, 2015, more than a year after the court issued its dispositional order, indicates an intention to challenge only the orders terminating his parental rights and denying his section 388 petition. Nowhere does the notice of appeal indicate an intention to challenge the juvenile court's jurisdictional findings. Even if it did indicate such an intention, the time for filing an appeal from the jurisdictional findings has long since passed. This court lacks jurisdiction to consider Father's challenge to the court's jurisdictional findings.

Father exposits *In re Erik P.* (2002) 104 Cal.App.4th 395 for the proposition that if substantial evidence failed to support the juvenile court's jurisdictional order then he was excused from filing a timely notice of appeal. Thus, Father maintains he may challenge the order in the instant appeal. *In re Erik P.* concerned a father who challenged on appeal the juvenile court's order finding the minor adoptable despite the father's failure to raise the issue below. (*Id.* at p. 399.) The court held that, although generally points not raised in the juvenile court cannot be raised on appeal, because it was the department's burden to prove adoptability by clear and convincing evidence, the father could raise insufficiency of the evidence upon timely appeal even though he failed to raise the issue below. (*Id.* at pp. 399-400.)

In re Erik P. is a case dealing with an exception to the forfeiture rule, not a case dealing with an exception to the jurisdictional requirement that one file a timely appeal from the challenged judgment. The father in *In re Erik P.* filed a timely appeal from the judgment he challenged. (*In re Erik P.*, *supra*, 104 Cal.App.4th at p. 398.) Thus, *In re*

Erik P. provides no support for Father's proposition that he can challenge jurisdictional orders for which the time to appeal has long since passed. This court has no jurisdiction to address Father's challenge to the juvenile court's jurisdictional findings.

1. Failure to Notify Father of His Appellate Rights

Father contends the court's failure to advise him of his appellate rights permits him to circumvent the general jurisdictional rules requiring that he file a timely appeal from the dispositional order in order to challenge the court's jurisdictional findings. We disagree.

Rule 5.590(a) requires the juvenile court to provide oral or written notice of appeal rights to "the child, if of sufficient age, and, *if present*, the parent or guardian . . . ." (Italics added.) Rule 5.590(a)'s history supports an interpretation that the notice requirements apply only when the parent is *present* at the hearing. Rule 5.590(a) traces its origin to former rules 251 and 1435(d). (23 pt. 1B West's Ann. Court Rules (2006 ed.) foll. rule 5.590, p. 573; 23 pt. 1B West's Ann. Court Rules (2015 supp.) foll. rule 5.590, p. 367.) Former rules 251 and 1435(d), which since their adoption applied to juvenile dependency cases,[6] always limited advisement of appeal rights to parents who

[6] As originally adopted, effective July 1, 1973, former rule 251 applied "[i]n juvenile court proceedings in which the minor is found to be a person described by Section 600, 601, or 602 of the Welfare and Institutions Code . . . ." At the time, former section 600 governed juvenile dependency proceedings. (Stats. 1971, ch. 1729, § 1, p. 3676.) The Legislature subsequently repealed former section 600 and enacted section 300. (Stats. 1976, ch. 1068, § 6, p. 4759 & § 20, p. 4782.) Effective July 1, 1978, the Judicial Council amended former rule 251 to substitute section 300 for former section 600. (Historical Notes, 23 pt. 1B West's Ann. Court Rules (2006 ed.) foll. rule 5.590, p. 574.)

were present for the jurisdictional hearing. (E.g., *In re Ryan R.* (2004) 122 Cal.App.4th 595, 598-599 [because mother was not present for the permanency hearing, she was not entitled to advisement under former rules 1463(h) and 1435(d) of her right to appeal from termination of her parental rights]; *In re Arthur N.* (1974) 36 Cal.App.3d 935, 940 [quoting former rule 251].) The fact that advisement of a parent's right to appeal from the disposition has always been predicated on presence at the hearing, despite numerous opportunities for the Judicial Council to provide otherwise, is strong evidence that the plain language of rule 5.590(a) accurately expresses the intent of its drafters.

Moreover, when interpreting rule 5.590(a), we must read the rule as a whole. (*In re Joshua A.* (2015) 239 Cal.App.4th 208, 215.) When a juvenile court sets a hearing under section 366.26, it must give oral notice of the right to file an extraordinary writ "to those present" and provide written notice to "any party who is not present . . . ." (Rule 5.590(b)(1), (2).) We must assume the drafters of rule 5.590(b) knew what they were doing when they required advisement of writ review rights to absent parents but did not similarly require advisement of appeal rights to absent parents.[7] Recently, this court

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[7] Rule 5.590(b) implements a specific legislative mandate that the Judicial Council adopt a rule to ensure a parent is given notice of the right to challenge by extraordinary writ an order setting a permanency hearing. (§ 366.26, subd. (*l*)(3)(A).) No similar legislative directive governs the giving of notice to parents of the right to appeal from the dispositional order. (See § 395.)

We may easily surmise the reason behind this distinction. An order setting a permanency hearing under section 366.26 places a parent in immediate peril of losing his or her parental rights, and the need to timely bring an appellate challenge is paramount. Providing notice of the right to challenge the order to an absent parent is an additional layer of protection to the parent's rights. In contrast, except for in those limited circumstances where the juvenile court finds jurisdiction but bypasses reunification

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extended the reasoning from those decisions to the juvenile court's failure to advise a parent under rule 5.590(a) of her right to appeal from the disposition when the parent's presence was not disputed.[8] (*In re A.O.*, *supra*, 242 Cal.App.4th at pp. 147-149.)

Here, however, Father was not present at the jurisdictional and dispositional hearing. Moreover, Father does not contend he was actually ignorant of his right to appeal from the disposition and he did not attempt to file a late notice of appeal. (*In re Arthur N.*, *supra*, 36 Cal.App.3d at pp. 938-941 [minor's failure to timely appeal jurisdictional order under § 602 was excused where the juvenile court failed to advise minor of his rights to appeal and to appointed counsel on appeal, minor was actually ignorant of his appellate rights, and he diligently filed a late notice of appeal once he learned of his appeal rights].) Thus, the juvenile court was not required to advise Father

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services and immediately sets a permanency hearing (in which case the parent is entitled to notice under rule 5.590(b) whether or not they are present), a jurisdictional finding does not place a parent in immediate peril of losing his or her parental rights. The parent will have a period of reunification services, and the ability to establish fitness and prevent the setting of a hearing under section 366.26. Because failure to timely appeal from the jurisdictional order is not of the same magnitude as failure to challenge the order setting the permanency hearing, the Legislature and Judicial Council could reasonably conclude notice need not be given to parents who are absent from the jurisdictional hearing. Moreover, the time for filing a notice of intent to file a petition for extraordinary writ is much shorter than that permitted for filing an appeal from a dispositional order. (Rules 8.406(a)(1), 8.450(e)(4).)

[8] Although the portion of the opinion which was certified for publication does not reflect whether the mother was present, we take judicial notice of the slip opinion in the case, case No. E062111, which does reflect that the mother was present at the dispositional hearing. (Evid. Code §§ 452, subd. (d), 459, subd. (a).)

of his right to appeal the dispositional orders and good cause does not exist to excuse his failure to even attempt to file an appeal from the orders.

Father cites *In re Cathina W.* (1998) 68 Cal.App.4th 716 for the proposition that he may now challenge the jurisdictional rulings because he never received notification of his *appeal* rights. (*Id.* at p. 724 [considering the merits of an attack on the validity of the order setting the § 366.26 hearing on an appeal from the order terminating parental rights].) Of course, *In re Cathina W.* is distinguishable because it concerned the failure of the juvenile court to provide notice of *writ* rights, not appeal rights. (*Ibid.*) This court has no jurisdiction to consider Father's claims regarding the juvenile court's jurisdictional findings.

2. Poverty

Defendant exposits *In re G.S.R.* (2008) 159 Cal.App.4th 1202 for the proposition that because the juvenile court's jurisdictional finding with respect to Father was purportedly based solely upon his lack of housing, the order amounts to a due process violation which can be reviewed for the first time on appeal from the order terminating his parental rights. (*Id.* at pp. 1210-1216; see *In re P.C.* (2008) 165 Cal.App.4th 98, 106-107 [the offending parent's parental rights may not be terminated where the only remaining alleged basis of detriment to the return of the children to the parent is that parent's poverty].) We disagree.

In an appeal from the juvenile court's order terminating the Father's parental rights, the court in *In re G.S.R.* held that a nonoffending parent's inability to provide

suitable housing due to poverty was insufficient evidence for the juvenile court to find by clear and convincing evidence that there was a substantial risk of detriment to place the child with the parent such that it could terminate the parent's parental rights. (*In re G.S.R.*, *supra*, 159 Cal.App.4th at pp. 1215-1216.) The court noted that "poverty alone, even abject poverty resulting in homelessness, is not a valid basis for assertion of juvenile court jurisdiction." (*Id*. at p. 1212.)

In re G.S.R. did not reverse the juvenile court's jurisdictional finding. Rather, it reversed the order terminating the father's parental rights and remanded the matter for a determination of detriment. If, on remand, the juvenile court could not find detriment, the *In re G.S.R.* court ordered the juvenile court to provide the father reunification services to include housing assistance. (*In re G.S.R.*, *supra*, 159 Cal.App.4th at p. 1215.)

Here, however, the court did not take jurisdiction over the minors with respect to Father simply because Father was homeless or had unsuitable housing. Rather, the court took jurisdiction over the minors with respect to Father under both the b-6 and g-2 allegations because Father himself informed the social worker that he was unable to provide for the minors. Father said that he was currently residing with his brother, but that the residence was inappropriate for the minors and that he was facing eviction. Father's statement that he could not provide for the minors was a valid basis for taking jurisdiction.

Moreover, *In re G.S.R.* is distinguishable from the instant case. In that case, the father was a nonoffending parent. (*In re G.S.R.*, *supra*, 159 Cal.App.4th at p. 1207.)

Also, the department in that case failed to provide the father with any assistance in finding suitable housing. (*Id*. at p. 1213.) Here, the Department provided Father with a referral to a residential program. Additionally, the father in *In re G.S.R* was very involved with the minor. (*Id*. at pp. 1206, 1214.) Here, Father had only visited with the elder minor five times prior to the initiation of the dependency proceedings. He had never met his younger son. Father's visitation with the minors was inconsistent. The court observed that Father had had only nine visits with the minors over a nine-month period. Finally, in *In re G.S.R.* the only basis for a finding of detriment was the father's lack of suitable housing. (*Id.* at p. 1208.) Here, Father failed to establish that he even participated in, let alone completed, the requisite components of his case plan that he complete a domestic violence program and undergo substance abuse testing. Thus, the juvenile court properly took jurisdiction over the minors and Father is estopped from challenging that finding in this appeal from the order terminating his parental rights.

3. IAC

Father contends his counsel provided constitutionally ineffective assistance by failing to challenge the juvenile court's jurisdictional finding. We disagree.

"[A] dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order . . . . We decline to carve out an exception to it here even though the issues raised involve the important constitutional and statutory rights to counsel and to the effective assistance of counsel." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151 [no right of parent to raise issues of IAC regarding

prior appealable orders for which the parent failed to appeal and the time to appeal had long since passed]; accord, *In re Janee J.* (1999) 74 Cal.App.4th 198, 206-208.)

"We address a claim of ineffective assistance of counsel in the dependency context by applying a two-part test. In the first step, we examine whether trial counsel acted in a manner expected of a reasonably competent attorney acting as a diligent advocate. If the answer is no, we move to the second step in which we examine whether, had counsel rendered competent service, the outcome of the proceeding would have been more favorable to the client. [Citation.]" (*In re Ana C.* (2012) 204 Cal.App.4th 1317, 1329-1230.)

"'"'"Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'" [Citation.] [¶] Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.]'" (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

Here, Father's contention that his counsel below failed to provide constitutionally effective assistance for failing to object to the juvenile court's jurisdictional findings with respect to Father fail for the reasons stated above, i.e., Father conceded he was unable to provide for the minors. Thus, Father cannot show either incompetence or prejudice

because Father himself admitted he could not provide for the minors, a valid basis for the juvenile court's jurisdictional finding.

B. *Reasonableness of Services*

Father contends the Department failed to provide him with reasonable reunification services. The Department responds that Father waived the issue of the reasonableness of his services by failing to file a notice of intent to file a writ petition. Father replies that his counsel should have challenged the reasonableness of his services below and that Father requested his counsel to file a notice of intent to file a petition for extraordinary writ, but that his counsel refused, thereby rendering IAC. We agree with the Department.

After the court issues an order setting a section 366.26 hearing, the court must advise the parent, *if present*, that if he wishes to preserve any right of review, he must file a notice of intent to file a writ petition and the time frame for doing so. (Rule 5.590(b), (b)(3).) If the parent is not present, the court must so advise the parent by mail within one day after the order. (Rule 5.590(b)(2), (b)(3).)

A party seeking to file a petition for extraordinary writ from an order setting a section 366.26 hearing must file a notice of intent to seek such review within no more than 37 days of the order challenged, depending on the circumstances. The parent must file the notice of intent within seven days if the parent is present. (Rule 8.450(e)(4).)

"[I]t is the parent, not the attorney, who has the burden to pursue appeal rights, particularly in the rule [8.450] setting. [Citations.]" (*In re Janee J.*, *supra*, 74

Cal.App.4th at p. 210.) A parent's failure to file a timely notice of intent to file a petition for extraordinary writ and the petition itself "precludes him from raising issues related to the order setting a section 366.26 hearing on appeal from a section 366.26 order [citation]." (*Karl S. v. Superior Court* (1995) 34 Cal.App.4th 1397, 1403-1404; accord, *In re Cathina W., supra*, 68 Cal.App.4th at pp. 719-722.)

Here, Father was present in court when the juvenile court found Father had been provided reasonable services, terminated Father's reunification services, and set the section 366.26 hearing. The juvenile court orally informed Father he had a right to challenge the ruling by the filing of a notice of intent to file a petition for extraordinary writ. The court clerk sent Father written notice of both his right and the method of seeking writ review of the juvenile court's order. Thus, it was Father's responsibility to file a notice of intent to challenge the juvenile court's finding that reasonable services had been provided and his failure to do so waived his right to raise the issue on an appeal from the termination of his parental rights.

Father notes that during his *Marsden*[9] hearing he complained that he had requested his counsel file a notice of intent to file a petition for extraordinary writ, but that his counsel refused to do so. Therefore, Father contends he is excused from raising the issue in a previous proceeding due to his counsel's provision of constitutionally ineffective assistance. We disagree.

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[9] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

"[T]o fall outside the waiver rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed. To allow an exception for mere 'reversible error' of that sort would abrogate the review scheme [citations] and turn the question of waiver into a review on the merits." (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 209.) "[R]esort to claims of ineffective assistance as an avenue down which to parade ordinary claims of reversible error is also not enough and that it is never enough, alone, to argue that counsel rendered ineffective assistance by not raising potentially reversible error on rule [8.450] writ review of a setting order." (*Ibid*.)

"[L]ate consideration of ineffective assistance claims defeats a carefully balanced legislative scheme by allowing a back-door review of matters which must be brought for appellate review by rule [8.450] writ at the setting hearing stage or by earlier appeals, that is, before the point is reached where reunification efforts have ceased and the child's need for permanence and stability become paramount to the parent's interest in the child's care, custody and companionship [citation]." (*In re Janee J.*, *supra*, 74 Cal.App.4th at p. 208.)

Father requested and received a *Marsden* hearing after his reunification services were terminated. Father complained that counsel had failed to seek appellate review of the order terminating his reunification services. Counsel notably indicated he did not file a notice of intent because "I had to look at the statutory basis and legal basis for a writ . . . and that basis simply does not exist." "I didn't have any evidence to present to show [Father] completed anything, any of his case plan."

Father, citing *In re Janee J.*, *supra*, 74 Cal.App.4th 198, claims that, despite case law deeming review of issues for which the jurisdictional time periods have expired without the filing of an appeal or notice of intent to file a writ petition, where due process considerations are paramount, the waiver rule may be dispensed with. However, *In re Janee J.* held that in order to dispense with the waiver rule and allow review of orders for which jurisdictional timelines have passed, "there must be some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole." (*Id.* at p. 208 [refusing to consider parent's IAC claims with respect to counsel's representation occurring prior to the order setting the § 366.26 hearing on an appeal from an order terminating the parent's parental rights].) We find no such fundamental defect here.

C. *Section 388 Petition*

Father contends the court erred in declining to grant him a hearing on his section 388 petition. We disagree.

In Father's second section 388 petition, he reported he had completed therapy and anger management and had a stable residence. Father contended reinstatement of his reunification services would benefit the minors because Father was now able to maintain sobriety and housing.

At the section 366.26 hearing on June 22, 2015, the minors' attorney noted that the documents attached to Father's latest petition were also attached to the previous petition.

The minors' attorney asserted there was nothing new in the petition and urged the court to deny a hearing on it. The court stated: "If I am understanding correctly, though, those documents have been submitted at an earlier date, and considered by the Court . . . ." Father's attorney responded: "They were not considered by the Court. It was withdrawn. They were submitted in February. It was—it was withdrawn in April. So this will be the offer considered by the Court." Father's attorney requested a continuance in order to provide the court with further information regarding the results of a substance abuse test; however, after conferring with counsel, Father's attorney indicated he was prepared to proceed on the matter.

The court stated: "I'm not inclined to accept the new filed JV-180s, nor am I inclined to grant any hearing on the JV-180s." The court observed: "So nothing has changed. So why would we consider it today?" Father's attorney[10] responded: "Well, it was withdrawn. So I'm asking the Court for the first time to consider father's complete—certifications of completion for both parenting and anger management . . . . This is—there are significant documents, and this is a significant request." The court replied: "They are significant documents. It is a significant request. They are dated much earlier than today. The Court has serious questions and—number one, why they weren't . . . brought to the Court's attention earlier, and; number two, why dad hasn't submitted to testing since the April date so that we would have some sort of history . . . ."

[10] Father's attorney is incorrectly identified in the reporter's transcript as counsel for the Department.

The court further observed: "I was not here. I was not the court in April. I don't know why the . . . request was . . . withdrawn. The fact is that [it was], and . . . so I [don't] . . . see [t]hat anything has changed since April." Father's counsel urged consideration of a change of circumstances from the date of the termination of Father's reunification services, not just from the filing of the petition in April 2014: "The Court would look at not whether or not there is a change since the last time, since the original filing, and then the subsequent withdrawal of these documents."

The attorney for the Department noted that section 388 petitions "are usually withdrawn when counsel or the Court doesn't feel there's sufficient" evidence to support it and hopes to allow more time "to provide more information to the Court to show father had been drug testing, which, apparently, he has not been drug testing. However, at this point, we are kind of having a hearing [on the section] 388 [petition]." The court responded: "Exactly, and . . . [Father's attorney] . . . I agree with your assessment that we're talking about a change of circumstance since reunification services were terminated. Again, the request for [a continuance] was done in April in order for father to show some proof of testing and he hasn't. So nothing has changed since then."

Father's attorney replied: "It—it was essentially regarding the prior request to continue the matter for the results of the drug test that father has conducted on his own." The court responded that it understood, but that there was still no evidence of drug testing: "So the Court's going to deny the request for lack of new evidence because it is not in the best interests . . . of the children."

"To prevail on a section 388 petition, the moving party must establish that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child. [Citation.]" (*In re J.T.* (2014) 228 Cal.App.4th 953, 965.) "Under section 388, a party 'need only make a prima facie showing to trigger the right to proceed by way of a full hearing.' [Citation.] The prima facie showing is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.] In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. [Citation.] The petition must be liberally construed in favor of its sufficiency. [Citations.]" (*In re J.P.* (2014) 229 Cal.App.4th 108, 127.) "Section 388 thus gives the court two choices: (1) summarily deny the petition or (2) hold a hearing. [Citations.]" (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912; contra, *In re G.B.* (2014) 227 Cal.App.4th 1147, 1158, fn. 5 [allowing argument on whether the mother had made a prima facie case in a § 388 petition "benefitted her by giving her the opportunity to establish a record supporting her request for an evidentiary hearing."].)

"We review a summary denial of a hearing on a modification petition for abuse of discretion. [Citation.] Under this standard of review, we will not disturb the decision of the trial court unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation.]" (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.) Any error by a juvenile court in denying a hearing on a section 388 petition may be deemed harmless where the petitioner fails to identify any additional

evidence the petitioner could have presented at an evidentiary hearing that would have established a right to reunification services. (*In re G.B.*, *supra*, 227 Cal.App.4th at pp. 1161-1165; contra, *In re Lesly G.*, *supra*, 162 Cal.App.4th at p. 916.)

"'Whether a previously made order should be modified [pursuant to section 388] rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established.' [Citation.] The denial of a section 388 motion rarely merits reversal as an abuse of discretion. [Citation.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686.)

First, we disagree with Father that the juvenile court denied him a hearing on his section 388 petition. We concede, as described *ante*, in footnote 5, that the minute order and the formal order contained in the clerk's transcript reflect, respectively, that the court denied the filing of the petition or at least a hearing on it. Nevertheless, as described above, the Department's attorney characterized the discussion of the petition as amounting to an actual hearing on the petition. The court agreed. Indeed, the court and counsel did discuss the merits of Father's petition before the court denied it. Thus, the juvenile court permitted Father a de facto, if not a de jure, hearing on the merits of his section 388 petition.

Second, even if we were to regard the documents in the clerk's transcript as dispositive on the issue of whether a hearing on Father's section 388 petition was provided, the court acted within its discretion in determining that Father failed to make a prima facie case of a change of circumstances and that modification of the order

terminating Father's reunification services was in the best interest of minors. Although Father had completed a parenting class, he neither provided evidence nor even alleged that he had participated in drug testing, a requisite component of his case plan. Likewise, although Father provided documentation that he had completed an anger management course, Father's case plan required that he participate in a domestic violence program for victims, not an anger management program. Thus, Father had failed to even participate in, let alone complete, two of the three requisite programs of his case plan.

Moreover, Father's asserted basis for the best interests of the minors was also lacking. The fact that Father had some unspecified and undocumented period of sobriety would not necessarily resound to the benefit of the minors' best interests. Father has also failed to allege that he could provide any evidence that he had completed substance abuse testing. (*In re G.B.*, *supra*, 227 Cal.App.4th at pp. 1161-1165 [any error by a juvenile court in denying a hearing on a § 388 petition may be deemed harmless where the petitioner fails to identify any additional evidence the petitioner could have presented at an evidentiary hearing that would have established a right to reunification services].)

Additionally, Father asserted that he had stable housing, but failed to provide any documentation, particularly with regard to whether he was capable of providing care to the minors or would be able to do so in the future. When weighed against the stability the minors had in the prospective adoptive home, in which they had been placed together three months earlier, the juvenile court's order that Father's alleged change of circumstances would not promote the best interest of the minors was within its discretion.

Father asserts that the juvenile court mistakenly considered only Father's progress since the withdrawal of his first section 388 petition; however, the record belies this contention. The court explicitly and rightly agreed with Father's counsel's "assessment that we're talking about a change of circumstances since reunification services were terminated." The court merely noted that Father had done nothing additional in the intervening two months since his first petition was withdrawn when the first court noted: "I think that there wasn't enough of a change of circumstance to—to justify this being heard . . . ." Thus, where the first court did not consider that Father's original petition stated a prima facie case for a hearing, the latter court, considering a virtually identical petition acted within its discretion in determining the latter petition did not state a prima facie case for a hearing either.

D. *IAC: Failure of Counsel to Raise the Beneficial Parent Relationship Exception to Termination of Parental Rights*

Father contends his counsel's failure to raise the beneficial parent relationship exception to termination of parental rights constituted prejudicial IAC. We disagree.

Once reunification services have been terminated and a child has been found adoptable, "adoption should be ordered unless exceptional circumstances exist." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Under section 366.26, subdivision (c)(1)(B)(i), one such exception exists where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." A beneficial relationship is established if it "'promotes the well-being of the child to such a

degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.'" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "The parent has the burden of proving that termination would be detrimental to the child . . . ." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350; *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1207.)

"'[T]he court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' [Citation.]" (*In re C.F.* (2011) 193 Cal.App.4th 549, 555.)

"[I]t is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350; accord, *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) "We determine whether there is substantial evidence to support the trial court's ruling by reviewing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling. [Citation.] If the court's ruling is supported by substantial evidence, the reviewing court must affirm the court's rejection of the exceptions to termination of parental rights . . . ." (*In re S.B.* (2008) 164 Cal.App.4th 289, 297-298.)

Here, Father has failed to demonstrate a valid argument could have been made that termination of his parental rights would be detrimental to the minors. Father had never had custody of the minors. He had only seen I.R. five times in I.R.'s life prior to initiation of the dependency proceedings. He had never seen J.R. Father's visitation with the minors was deemed "inconsistent." Father canceled visits or simply failed to show for others. The court observed that Father had had only nine visits with the minors over a nine-month period. Father himself admitted missing visits. The minors had been living with the prospective adoptive parents on a daily basis for the previous three months. Thus, there was insufficient evidence to support a finding that termination of Father's parental rights would have been detrimental to the minors.

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.